No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1954

DANIEL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R. 257–264) is reported at 210 F. 2d 496.

JURISDICTION

The judgment of the Court of Appeals was entered February 26, 1954 (R. 264), and a petition for rehearing was denied March 26, 1954 (R. 267). The petition for a writ of certiorari was filed April 26, 1954, and was granted on June 7, 1954 (R. 268). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's admissions were sufficiently corroborated.

2. Whether the trial court erred in admitting petitioner's sworn net worth statement. This question is made up of two subsidiary questions:

a. Whether the statement was obtained by a false promise that petitioner would be immune from criminal prosecution.

b. Whether, after hearing evidence on a motion before trial to suppress the statement and denying the motion, the trial judge was required to interrupt the trial for a further preliminary hearing in the absence of the jury on the admissibility of the statement.

3. Whether, in view of the trial court's instruction that the jury should disregard petitioner's net worth admissions and evidence derived therefrom if they found that these admissions had been obtained by fraud, the Court of Appeals was required to find that there was sufficient evidence independent of the admissions to sustain the conviction.

4. Whether the Court of Appeals affirmed petitioner's conviction on a theory inconsistent with the one on which he was convicted.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

* * * * *

(b) *Husband and Wife.*—A husband and wife may make a single return jointly. Such a return may be made even though

one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year.

* * * * *

(26 U. S. C. 1946 ed., Sec. 51.)

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 5, 1952, the petitioner and his wife, Eva George Smith, were jointly named in each of five counts of an indictment filed in the United States District Court for the District of Massachusetts, charging them with wilful attempts to evade and defeat their income taxes for the years 1946 through 1950 by filing fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code (R. 5–8). The amounts

of their joint net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946)	$5,777.66	$361.00	$33,533.42	$13,757.63
Count II (1947)	4,690.27	528.00	40,758.12	24,273.88
Count III (1948)	4,849.51	422.00	58,529.48	21,442.80
Count IV (1949)	3,319.85	198.00	67,581.10	26,289.09
Count V (1950)	4,508.01	471.20	34,208.82	9,618.02

At the close of the Government's case the trial court granted a motion by petitioner's wife for a judgment of acquittal on all five counts (R. 184–185). A similar motion was also filed on behalf of the petitioner (R. 15–16). At the close of all the evidence the court granted the petitioner's motion for acquittal as to the fifth count only (R. 207). The jury found the petitioner guilty on the first four counts (R. 214–215), and on June 16, 1953, he was sentenced to imprisonment for consecutive terms of a year and a day on each of the four counts and was fined $5,000 (R. 25). The conviction was affirmed unanimously by the Court of Appeals for the First Circuit (R. 257–264).

The theory of the prosecution was that there were increases in the net worth of petitioner and his wife for each of the years covered by the indictment considerably in excess of their reported income; that these increases represented current taxable income, derived largely from a racing

news service business opened by petitioner toward the end of 1945 (the first year in the indictment was 1946); and that the amounts of their taxable income were thus greatly in excess of the amounts reported in their joint returns. The proof supporting this theory and petitioner's conviction included (1) evidence of large net worth increases in the form of bank deposits, securities, real property, and other assets, based on documentary records and the testimony of witnesses; (2) evidence showing the source of these increases in petitioner's racing news service; and (3) petitioner's admissions that his net worth increases had far exceeded his reported income (though the increases he admitted were substantially smaller than those shown by the Government's independent evidence) and that the excess reflected unreported income on which the tax had not been paid. This evidence may be summarized as follows:

1. *The net worth increases.*—The evidence adduced at the trial, independent of petitioner's admissions,[1] showed that the joint net worth of

[1] Discounting the admissions described below (pp. 15–16), petitioner states (Br. 31): "All of the evidence of assets and expenditures in the case, with one or two minor exceptions, came from testimony of witnesses." While there is some disagreement as to whether the jury may be supposed to have considered the admissions significant (see p. 58, *infra*), it is agreed that the net worth computations summarized immediately below were in all substantial respects built from the independent evidence.

petitioner and his wife increased during the years 1946 through 1949 (the years for which petitioner was convicted) by the following amounts, which are contrasted here with the taxable income they reported for those years (R. 151–155, 217, 219–227):

	Net worth increases [1]	Reported income
1946	$30,553.92	$3,777.68
1947	45,977.12	4,690.27
1948	54,809.48	4,849.51
1949	65,389.23	3,319.85

[1] In the figures from which these totals are derived, an item of $3,750 for United States Government bonds is shown twice, apparently erroneously, among the assets listed for 1946 (R. 217–18). Correction of this error, which has been immaterial throughout these proceedings, would decrease by $3,750 the net worth increase shown for 1946 and raise by the same amount the net worth increase shown for 1947.

These increases were in addition to the personal living expenses (nondeductible for tax purposes) of petitioner and his wife, an amount he had admitted to be $3,000 yearly for 1946 and 1947 and $4,000 for 1948 and 1949 (R. 157, 233).[2] While the sufficiency of the proof of the assets comprising the net worth computations is not disputed (cf. note 1, p. 6, *supra*), the major items bear significantly on the issues before the Court. Accordingly, we summarize these items here.

[2] On the basis of the net worth increases plus living expenses, revenue agents determined that for the years 1946 through 1949, petitioner and his wife should have paid $85,764 in income taxes rather than the $1,509 they paid, so that the taxes were underpaid to the extent of $84,255 (R. 158–159).

A. CASH IN BANKS

Between them, petitioner and his wife had fourteen accounts in twelve banks, nine of which were opened during the years 1946 through 1948 (R. 27–39, 57). One of these had been opened by petitioner in 1935 in the name of "Dean Muir" together with his sister, who testified that she was a depositor in name only with no interest in the account (R. 36–38). The other thirteen accounts were in the name of petitioner's wife; for six of these, including five opened after her marriage, she used her maiden name, while seven were held in her married name.[3] On March 6, 1946, three of the five accounts held in the name of petitioner's wife became joint, with her brother, John J. George, shown as her joint depositor; the same arrangement was employed for each of the eight accounts she opened thereafter (R. 27–36, 38–39, 57). The brother testified that he had furnished none of the funds deposited in these accounts, that he had no interest in any of them, and that he had permitted his name to be used to accommodate his sister (R. 40–41).

At the end of 1945, petitioner and his wife had $8,058.58 deposited in their various bank accounts. By the end of 1946, the first full year in which

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[3] Petitioner and his wife were married in 1939 (R. 50). The single discovered bank account held by Mrs. Smith before the marriage had been opened by her in 1931. On December 31, 1939, the balance in this account was $76.25. (R. 36, Ex. 16 (a), unprinted.)

petitioner operated the racing news business he reopened toward the end of 1945 (*infra*, p. 15), this amount had increased to $39,238.61,[4] and by the end of 1947 the figure was $80,482.73. Thereafter, as other large assets were acquired (and while the total net worth continued to increase by large amounts), the total bank deposits declined to $69,300.92 at the end of 1948 and $42,878.72 at the end of 1949 (R. 218).

Checks drawn on at least five of the bank accounts in his wife's name were made payable to petitioner, endorsed over to him, or used to purchase assets either held in his name or of which he admitted ownership (R. 33, 34, 36, 38, 48, 57–58). In his statement purporting to show his and his wife's joint net worth (*infra*, p. 16), petitioner showed bank deposits for the years 1946 through 1949 substantially exceeding those in the one account he had opened himself though far smaller than those established at the trial (Compare R. 231 with R. 218).

B. SECURITIES

The first record of a securities purchase by either petitioner or his wife was a purchase in her name on December 8, 1947 (R. 119). In 1948, petitioner opened a separate brokerage ac-

[4] This amount represents the sum left after deducting the $3,750 in bonds included in the total of $42,988.61 in bank deposits shown at R. 218. See the footnote to the table at p. 7, *supra*.

count in his own name (R. 120). The records of holdings in these accounts showed the following year-end totals, representing the cost of the securities (R. 117–121, 217):

Date	Wife's account	Petitioner's account	Total
Dec. 31, 1947	$9,280.21		$9,280.21
Dec. 31, 1948	37,602.57	$3,882.96	41,485.53
Dec. 31, 1949	35,673.79	3,882.96	39,556.75

In the joint net worth statement petitioner signed and gave to a revenue agent in June 1951 (*infra*, pp. 15–16), he showed securities holdings substantially larger than those held in his own account, but substantially smaller than the total joint holdings proved at the trial (R. 231). Checks written in payment for securities were traced through various of the bank accounts. These checks were variously signed by the brother of petitioner's wife and by petitioner himself. They included one check for $7,000 representing a withdrawal from petitioner's "Dean Muir" account and paid to their brokers in 1948, the amount of this payment exceeding by over $3,000 the total of petitioner's securities holdings in his own name. Other checks, paid by the brokers to petitioner's wife, were endorsed over to petitioner or to his Falmouth Bowling Club (R. 32–33, 34, 36–37, 57–58, 120–121).

In addition to the securities held in the above-described accounts, $30,000 was paid in 1949 for

shares in a newly organized bank issued in the name of Eva Smith. $20,000 of this price was paid by three checks drawn on accounts in the name of petitioner's wife and her brother. The remaining $10,000 was paid by two cashier's checks not traceable to any particular account (R. 115–117, 33–35, 36).

C. REAL ESTATE

In 1939, petitioner bought a house for $10,500, paying an additional $1,500 for its furnishings. He and his wife lived in this residence until 1946, when it was sold for $10,000 (R. 45, 50, 131).

On July 8, 1943, another residence was purchased in the name of petitioner's wife, for which petitioner said he paid $9,600 less $1,000 returned to him to cover repairs. According to petitioner, an $8,000 mortgage was given on this house and then paid off at a time he couldn't recall (R. 45, 132, 244–246). In 1948, this residence was repaired and improved at a cost of $14,631.09 (R. 107–109, 122–123, 163).[5]

On May 29, 1946, petitioner purchased a brick building in Worcester, Massachusetts, in which his racing news business was conducted. The price of this property, to which title was taken in

[5] A general contractor who had done most of this work on the house testified that he had arranged for its performance with petitioner, but had been paid by checks written by John J. George, the brother of petitioner's wife, who was a straw depositor in most of her bank accounts (R. 107–109).

his wife's name, was $35,600, but it was mortgaged for $33,000 or $34,000.[6] John J. George, the wife's brother, testified that he made the annual payments of $1,000 on this mortgage (R. 43–44, 63, 132, 162, 239).

In December of 1949, petitioner bought the Falmouth Bowling Club, a building housing a cocktail lounge and dining room with a dance floor. Title to the property was taken in the name of petitioner's wife, who in turn leased it to the Falmouth Bowling Club, Inc., a corporation.[7] The price was $75,000, of which $35,000 was paid at the time of the sale with a mortgage covering the balance (R. 49–50, 110). Petitioner later admitted that the funds for the purchase came from his racing news business and that at least some of these earnings had not been reported on his income tax returns (R. 62).

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[6] Witness George testified that the mortgage was for $33,000 (R. 44). However, petitioner had told a revenue agent that the mortgage was for $34,000 (R. 132).

[7] Listed as officers of the Club were John J. George, president; Elsie G. George, treasurer; and Eva G. George (the maiden name of petitioner's wife), clerk. Though not listed as an officer, petitioner later admitted that he owned the enterprise (the corporation issued no stock), kept its books, and played an active part in its management (R. 134–135). The sellers of the property had negotiated with petitioner for the sale (R. 111).

D. OTHER ASSETS

A number of other substantial acquisitions were made by petitioner and his wife during the period covered by the indictment. The major items, traced chronologically, begin with the purchase on December 30, 1946, of United States Savings Bonds costing $3,750, acquired in the names of petitioner's wife and her brother. The latter testified that he had furnished none of the funds for this purchase and had no interest in the bonds (R. 35, 41).

In 1947, petitioner's wife bought a Cadillac automobile for $2,978 (R. 106–107). In the following year, petitioner bought a new Cadillac for $4,678.70, apparently trading the prior year's model toward the purchase price (R. 163).

In 1949, a premium payment of $37,039.64 was made for an annuity policy sold to petitioner's wife, with petitioner as beneficiary and their daughter as contingent beneficiary (R. 53–56, 30, 31, 36–38).* In December of the same year, petitioner's wife acquired a mink coat and cape for which $3,750 was paid from one of her bank accounts (R. 104, 34).

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* This policy had been purchased in November of 1948 and a premium payment of $10,243.80 had been made at that time (R. 54). However, the Government's computation summarizing the net worth evidence omitted this payment and valued the policy at only $37,039.64 (R. 217). Accordingly, we have omitted the additional $10,000 in joint net worth which should have appeared beginning in 1948.

2. *Source of the net worth increases.*—Prior to 1941 petitioner worked for one Jim Coan as manager of the Union News Associates, an organization furnishing racing information to bookies in the area of Worcester, Massachusetts (R. 62–63). With the advent of the war, the need for this service disappeared, and petitioner worked in a package store during the years 1941 to 1945 at a salary of $40 a week (R. 63). His wife worked for a short time during this period, apparently as a hairdresser, but from 1943 until the end of 1950 she had no occupation other than housewife (R. 51, 63, Ex. 13 (b) (unprinted)).[9] Petitioner told a revenue agent that because his wife worked, and because "he was not a spender," his modest income during the war years proved adequate (R. 63).

The petitioner filed no income tax returns for the years 1936 through 1939 (R. 26). He filed nontaxable returns for 1940 and 1942; a taxable return for 1941; a nonassessable return for 1943; and a return calling for a refund to him for 1944 (R. 27). The one bank account he opened him-

[9] In addition to the securities held in her name (*supra*, p. 10), petitioner's wife had one source of income from which she realized insignificant amounts. In 1943, she became a partner with one James A. Taylor in the operation of a drugstore (R. 112). According to the joint returns she filed with petitioner, she received $1,112.25 from this enterprise in 1945 (Ex. 6, unprinted). For the years 1946 through 1949, the years on which petitioner was convicted, a total of $1,786.65 was reportedly derived from this business (R. 219–228).

self, using the name Dean Muir (*supra*, p. 8), contained a balance of $103.75 on December 31, 1939, and $3,536.92 on December 31, 1945 (R. 36–38, Ex. 17 (unprinted)).

The pivotal event in the financial history of the Smiths occurred when petitioner began to operate the racing news service himself. In 1945, Jim Coan, former owner of the business, died (R. 65). Toward the end of that year, when the war was over, the demand for the service revived and petitioner reopened the Union News Associates as his own business (R. 51, 62). Because of the nature of the business, which he continued to operate until some time in 1949, petitioner kept no records of any kind (R. 52, 61, 130). He admitted, specifically, however, that he failed to report at least some of the income from this business (R. 62). His written admissions discussed below, while not referring directly to this business, also showed substantial amounts of unreported income. And petitioner's brother-in-law, who prepared his returns, testified that, so far as he knew, during the period in question, while petitioner was operating the racing news service, petitioner had no other occupation (R. 52–53).

3. *Petitioner's admissions.*—During the investigation of his tax returns, petitioner admitted at one point that he had had unreported income from the racing news business (R. 62). In June 1951 an accountant, Delaney, representing peti-

tioner gave to a revenue agent a statement showing what purported to be the net worth of petitioner and his wife at the end of each year from 1945 through 1949. This statement, signed only by the petitioner, in which he declared under oath that it represented *his* true worth for the period covered, showed annual net worth increases substantially exceeding the joint income petitioner and his wife had reported. It was accompanied by a check for $15,000 in payment for taxes owing for that period [10] (R. 66–67, 86, 92–93, 123, 231). It is this statement which gives rise to the issues petitioner raises (Br. 2–3) as to corroboration and admissibility.

Relating the events leading to petitioner's submission of the net worth statement, John P. McMahon, the Special Agent of the Treasury Department to whom the statement was given, testified that he was assigned to investigate petitioner's income tax liability on October 13, 1950 (R. 71). Petitioner, having been notified of the investigation (R. 58–9), retained as his representative William J. Delaney, an accountant who had been employed as a Special Agent until 1949. At a conference with McMahon on April 30, 1951, petitioner, accompanied by Delaney, answered questions about his racing news business and the Falmouth Bowling Club, stating that he kept no

[10] Compare note 2, p. 7, *supra*, showing on the Government's net worth evidence tax underpayments amounting to $84,255.

records for the news service and had failed to report some of the income derived from it (R. 59–66, 103).

Both before and after the conference of April 30, there were numerous conversations between McMahon and Delaney concerning the preparation by Delaney of a statement showing the increases in petitioner's net worth for the years in question (R. 71–91). On May 24, Delaney informed McMahon that according to his figures petitioner owed $28,000 in additional income taxes and fraud penalties (R. 76–77, 82–83). On June 11, Delaney told McMahon that he would bring in a $15,000 check and a net worth statement (R. 90–92). On June 13, Delaney gave McMahon the signed net worth statement and $15,000 check (R. 66–67, 86, 92–93). The check was returned to Delaney the following day on the ground that payment of taxes could not be accepted while the possibility of criminal proceedings was being considered (R. 94, 235). On July 17, 1951, at a conference attended by petitioner, Delaney, McMahon, and two other special agents, Delaney said he would never have submitted the net worth statement had he not believed that the case would be closed on that basis (R. 95–96, 191).

Agent McMahon testified at the trial that he had never intended to close the case upon receipt of the statement and had never told Delaney any-

thing to suggest such an intention (R. 87–88).[11] Delaney testified that on one of his visits to McMahon's office, the latter said that, upon receipt of the statement, "he would close the case in the usual way." On cross-examination, Delaney was asked whether he knew from his experience as a Special Agent that such an agent lacked authority to close a case himself. Delaney said he had not known this (R. 203).

Except for Delaney's, the defense offered no testimony bearing on the counts of the indictment here in issue.[12] Petitioner's wife, who had been acquitted at the conclusion of the Government's case (R. 184–185), did not take the stand.

SUMMARY OF ARGUMENT

I

Petitioner's own statements showed substantial net worth increases admitted to represent unreported income. These admissions were amply corroborated.

Evidence independent of petitioner's admissions proved net worth increases and nondeductible expenditures for each year ten to twenty times as great as the taxable income petitioner and his

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[11] The facts of petitioner's pretrial motion to suppress the statement and the procedure at the trial are recounted more fully in the pertinent portion of our argument, *infra*, pp. 35–37.

[12] Another witness, Rowe (see R. 185), testified on matters pertaining to the year 1950, for which petitioner was acquitted.

wife reported. These increases began and continued concurrently with petitioner's commencement and operation of a racing news business for which he kept no records whatsoever (and which he admitted was the source of unreported income). Much of the joint wealth accumulated during the prosecution years was kept in the name of petitioner's wife and her brother, the latter testifying that he had no real interest in or claim to the property. The wife had no source of income to account for these acquisitions. And it was shown in repeated instances that this wealth, evidently originating with petitioner, remained subject to his disposal. The overall pattern of increased wealth and concealment fully confirmed petitioner's admission of the material fact that he had failed to report taxable income.

The fact that the Government's proof showed at every point net worth and net worth increases far larger than petitioner had admitted is plainly of no help to petitioner. Nor is there merit in the claim that the corroboration was inadequate because it failed to prove independently the admission that petitioner had no substantial amount of cash on hand at the starting point of the net worth computations. In the first place, such an admission, which shows in itself no element of the *corpus delicti*, need not be corroborated by independent proof of the same specific fact. See Brief for the United States in *United States* v.

Calderon, No. 25, pp. 20–31. Secondly, however, the independent evidence here, as in *Calderon*, clearly warranted the conclusion that, as he admitted, petitioner had no significant sum in undeposited currency at the starting point.

II

Petitioner's sworn net worth statement was properly received in evidence. The trial judge heard the conflicting testimony as to whether there had been a promise of immunity both on a pretrial motion to suppress and at the trial. His determination and the jury's verdict, affirmed by the court below, are solidly supported by the record, leaving no basis for petitioner's effort to obtain a reversal by this Court on this issue of fact.

There is no substance in the procedural argument that the trial judge should have interrupted the trial for a preliminary hearing, with the jury absent, before admitting the statement. There had been precisely such a preliminary hearing on the motion to suppress. At that hearing, the trial judge had heard the testimony of petitioner's accountant and other witnesses. All petitioner asked at the trial was that the judge should hear the accountant once again without the jury. It is enough in the circumstances that the accountant repeated his testimony before both the judge and the jury. The petitioner himself, who had not testified at the pretrial hearing and who obviously

was in no position to have direct knowledge on this issue, in no way hinted that he wished to be heard at the trial in the jury's absence. The faint suggestion that he might possibly have testified had there been a preliminary hearing is an unsubstantial afterthought. Accordingly, the decision in *United States* v. *Carignan,* 342 U. S. 36, is inapplicable here.

III

Petitioner did not request an instruction that the jury should acquit him if it rejected his admissions. Nor did he urge that the Court of Appeals should determine whether the evidence independent of the admissions was sufficient to support the conviction. There is thus no basis for his contention that the failure of the Court of Appeals to make such a determination constitutes reversible error.

This novel argument fails in any event because it ignores the settled rule that the evidence on appeal must be appraised on "the view most favorable to the Government." *Glasser* v. *United States,* 315 U. S. 60, 80. It would be inconsistent with this rule for the appellate court (1) to assume hypothetically, with no basis in the jury's general verdict, that the jury rejected the admissions and convicted on the other evidence alone, and (2) to reverse if this other evidence was insufficient to support the conviction. The assumption on appeal must be that the jury, having con-

victed, relied on all the evidence. Thus, although we think the evidence independent of petitioner's admissions would sustain the verdict, there is no reason to consider the sufficiency of only this part of the record on appeal.

While it is unnecessary to reach the problem here, we argue further that, if there had been a request for an instruction to acquit if the admissions were rejected, the request would properly have been denied. For such an instruction, making admissibility a question for the jury rather than the judge, and making a jury "ruling" that evidence was improperly admitted a basis for acquittal rather than a new trial, contemplates the discharge of defendants who should properly stand trial on competent evidence.

IV

There was no inconsistency between the theory on which petitioner was convicted and the theory on which the Court of Appeals affirmed. On the Government's theory at the trial, it did not matter whether petitioner or his wife "owned" the increased wealth they acquired over the prosecution years. It was sufficient to show that petitioner knowingly filed false joint returns with his wife, knowingly underreporting their joint income and tax liability. This theory is clearly within the wilful attempt "to evade or defeat any tax" made punishable by Section 145 (b). Accordingly, if petitioner is correct in urging that this was the

theory on which the jury convicted, since the evidence clearly sustained it, the affirmance was proper. *Nye & Nissen* v. *United States*, 336 U. S. 613, 618. The Court of Appeals, in finding that petitioner himself was in substantial fact the owner as well as earner of the wealth shown in the joint net worth increases, only added a factual conclusion which, though plainly warranted by the evidence, was not required to sustain the conviction. This additional finding, which was probably made by the jury and required (unnecessarily, in our view) by the trial court's instructions, is in any event no basis for the claim of "inconsistency" asserted by petitioner.

ARGUMENT

I. PETITIONER'S ADMISSIONS WERE AMPLY CORROBORATED BY INDEPENDENT EVIDENCE OF HIS GUILT

The evidence against petitioner included a statement signed by him under oath showing increases in his and his wife's joint net worth substantially exceeding their reported income during the period for which he was prosecuted and convicted. *Supra*, pp. 15–16. There was, in addition, testimony of a revenue agent that petitioner had admitted failing to report taxable income during this period (R. 62). Addressing himself primarily to the first of these items, the written net worth statement, petitioner contends (Br. 22–24) that the starting point shown on this statement

was insufficiently corroborated. He omits any discussion of the law pertinent to this contention, equating the issue here with that pending in *United States* v. *Calderon*, No. 25. Presumably, though petitioner does not state them, the conclusions which would follow from his argument if it were sound are (1) that the jury should not have been permitted to consider the admissions and (2) that his conviction should be reversed for insufficiency of competent evidence.

Strikingly inconsistent with this argument is petitioner's insistence elsewhere in his brief (pp. 21, 33) that his net worth statement could not conceivably have been the basis for his conviction and that the jury's verdict could only have resulted from the other evidence in the case. In this assertion—made, of course, in connection with another point—petitioner himself states the complete answer to the argument considered here. For, while we cannot agree with the speculative suggestion that the jury ignored entirely petitioner's damaging admissions, there was, as we show below (pp. 28–31, 33–34), ample independent evidence to corroborate the damaging proof contained in these admissions.

Before turning to this demonstration, however, we think some preliminary analysis of this issue may be helpful. While petitioner identifies his cause wholly with *United States* v. *Calderon*, the problem of the corroboration requirement is posed here in a somewhat different posture. Ex-

ploration of the differences may shed light on *Calderon* as well as this case.

1. In the *Calderon* case, the disputed admission of the defendant was a statement that he had had $500 in cash on hand at the time serving in the Government's proof as the starting point of the net worth computations. Standing alone, that admission conceded neither an underreporting of income nor a willful attempt to evade taxes; it showed, in other words, no element of the *corpus delicti*. Accordingly, we have argued in that case that the rule requiring corroboration of a confession has no meaningful application to the admission there involved—i. e., that there was no need for independent evidence of the specific, subsidiary fact of cash on hand at the starting point.[11] This is so, we believe, basically because the reason for the corroboration rule—to protect "the administration of the criminal law against errors in convictions based upon untrue confessions alone" (*Warszower* v. *United States*, 312 U. S. 342, 347)—is obviously not present in the case of an admission which is by itself insufficient to make out even one element of the crime. Stated otherwise, our point is that the requirement that there be independent evidence of the

[11] We show further in *Calderon* that, even if the rule were otherwise, the Government would prevail on the ground that there was in fact substantial evidence that the respondent there had little cash on hand at the starting point. Brief for the United States, pp. 31–38.

corpus delicti is pointlessly expanded and distorted when, in addition to independent proof tending to establish each element of the offense, independent evidence is demanded to prove a subsidiary fact shown by an admission—thus making the admission itself usable only as cumulative, corroborative evidence.

In the instant case, however, petitioner's admissions showed more than the limited, intermediate fact of cash on hand revealed in the *Calderon* admission. Here, petitioner's signed statement admitted net worth increases plus nondeductible expenditures over the prosecution years substantially exceeding the income petitioner had reported for those years. Accompanied by a belated tender of unpaid income taxes, the statement admitted an element of the alleged offense—underreporting of taxable income and underpayment of tax.

And so petitioner in one important sense understates his case when he places it on all fours with *Calderon* and argues—incorrectly, in our view—only that there had to be independent evidence of his "starting net worth as stated in his written and verbal admissions" (Pet. Br. 22). Here, the admissions at least approached a confession of guilt.[14] They acknowledged the vital

[14] Indeed, Wigmore defines "confession" as including an acknowledgment "*of the truth of the guilty fact charged* or *of some essential part of it*" while excluding "acknowledgments of subordinate facts colorless with reference to actual guilt." 3 Wigmore, *Evidence* (3d ed.), § 821, pp. 238, 239.

fact of unreported income—though not conceding, of course, that there had been a willful attempt to evade taxes.[15] Thus, there is presented a situation fairly calling into issue the corroboration requirement misapplied by the court of appeals in *Calderon*.[16] That issue is clearly resolved against petitioner by the mass of corroborative evidence reviewed below. Pp. 28–31, 33–34, *infra*.

What we emphasize at this juncture is that the problem is only clouded by petitioner's misconceived contention that the corroborative evidence was required to prove his "starting net worth as stated in his written and verbal admissions." The ultimate fact on which these admissions bore was not "starting net worth", but underreporting of income. The starting point was nothing more than what its description represents—a point to start from in establishing that ultimate fact. The

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[15] Petitioner's representative, the accountant Delaney, had estimated that the unpaid taxes plus a fraud penalty would amount to $28,000. Petitioner's check for $15,000 omitted entirely any penalty payment (R. 76–92, 187–189, 200–202, 205).

[16] Here, as in *Calderon*, the corroborative evidence is ample beyond doubt. See pp. 28–31, 33–34, *infra*. As in our brief in that case (pp. 20–22), therefore, we omit any discussion here of whether (1) the requirement that confessions be corroborated, never enforced in a square holding by this Court, merits retention in the federal courts or (2) whether the requirement should, in any event, extend to admissions, which "are not usually subject to the same restrictions on admissibility as are confessions." *Stein* v. *New York*, 346 U. S. 156, 162–3, n. 5. Compare the Government's brief in *Opper* v. *United States*, No. 49, this Term, pp. 25–45.

crucial aspect of petitioner's admissions was not the starting point they stated or the particular increases in net worth they showed (all of which, increases as well as starting point, were shown by the Government's proof to be larger than stated by petitioner), but their acknowledgment of the important material fact that he had understated his income and the tax due thereon.

The nature of proof in general and the rule requiring corroboration of confessions in particular are both lost from view in the suggestion that petitioner's admissions could not be considered or given weight because the subsidiary fact of starting point net worth, as it was stated in these admissions, was not corroborated by independent evidence. The jury could consider, for what it was worth, petitioner's acknowledgment that he had understated and underpaid his income taxes. On any sensible theory of the corroboration rule, it was sufficient for this purpose that there was independent evidence of this element of the *corpus delicti* (in addition, of course, to proof of a wilful attempt to evade taxes, as to which no issue is presented here).

2. As we have noted, petitioner substantially defeats his own corroboration argument when he urges elsewhere that he was convicted on the evidence independent of his admissions. Whether or not this conjecture is warranted, the independent evidence was assuredly sufficient corroboration.

By detailed evidence of bank accounts, stocks, real property, and other expenditures and acquisitions, the Government proved that the net worth increases and nondeductible expenditures of petitioner and his wife during each of the years 1946 through 1949 were ten to twenty times as great as the taxable income they reported. *Supra*, pp. 6–13. It was shown that these huge increases in discoverable evidence of affluence began with petitioner's reopening late in 1945 of a racing news information service for which he had formerly worked as a salaried employee but which he conducted from 1946 to 1949 as his own business. It was undisputed that petitioner kept no records of his receipts from this business. Cf. *Spies* v. *United States*, 317 U. S. 492, 500.

The evidence showed, moreover, a pattern of new wealth and concealment in petitioner's financial affairs pointing strongly to conscious tax evasion. Between them, petitioner and his wife had fourteen bank accounts, nine opened after petitioner began operating the racing news information service as his own business, in which the total deposits swelled grandly beginning in 1946. Thirteen of these accounts were in the name of petitioner's wife, six in her maiden name (though five of these six were opened long after her marriage to petitioner). In ten of the accounts, the brother of petitioner's wife was shown as joint or several owner, though he admitted that he had

no interest in the funds they contained."[17] In repeated instances, funds drawn from accounts in the wife's name were shown to have been turned over to petitioner or used to purchase assets he admittedly owned. *Supra*, pp. 8–9.

Though they had owned none before 1946, petitioner and his wife made large purchases of securities after 1946, each through a separate brokerage account, the wife's being by far the larger of the two. As in the case of her bank accounts, sums paid to the wife from her brokerage accounts were proved in specific instances to have been endorsed over to petitioner. *Supra*, pp. 9–10.

The rest of the picture, summarized in our Statement need not be repeated here. It is a graphic story of huge, steady increases in wealth from 1946 through 1949, symbolized by furs and Cadillac cars, new and more expensive real property acquisitions, a sizeable annuity, and a $35,000 cash payment in 1949 for a new drinking and dining establishment.

Taken together with petitioner's admissions of increases in net worth representing unreported taxable income during these years, this evidence made out an overwhelming showing of his guilt.

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[17] Similarly, petitioner's wife (using her maiden name) and her brother were shown as joint and several owners of Government bonds purchased on December 30, 1946, for $3,750. The brother testified that he had supplied none of the consideration for this purchase and had no interest in the bonds (R. 35, 41).

The narrow point here is that the admissions and the independent evidence could reasonably, naturally, and persuasively be taken together. For the evidence apart from the admissions—if it was not alone sufficient (petitioner says the jury did find it sufficient) to warrant a verdict of guilty—at least weighed heavily toward establishing that petitioner had had unreported income. To put the matter in terms of the most severely technical version of the corroboration requirement (see the Government's brief in *Calderon*, pp. 25–26), the independent evidence reached the whole of the *corpus delicti*, including the element of unreported income to which petitioner's admissions related. The argument that there was insufficient corroboration is plainly without merit.

3. We return, finally, to petitioner's insistence that the starting point net worth shown in his own statement should have been corroborated. As we have indicated, far from proving the same starting point, the independent evidence showed a greater net worth at this point and at each subsequent point (and far greater net worth increases) than petitioner had admitted. And we think it clear that no rational version of the rule requiring corroboration of a confession or admission can be supposed to require independent proof establishing the truth of each detail of a defendant's statement used against him. The details may, as here, be inaccurate in part. The prose-

cution may have no reason or need to establish the correctness of such details; it may even, as here, undertake to prove their falsity.[18] What is required at most is evidence making the admission credible and reliable in its incriminating aspect.

Consideration should be given here to one important subsidiary detail on which petitioner's admission and the Government's net worth computation were in agreement; both showed no sum of cash on hand at the starting point on December 31, 1945. We have argued in *Calderon* that the jury was free to find this fact from the admission alone, without independent proof showing the absence of any considerable amount of cash on hand. That argument applies here. But, again as in *Calderon*, we point out that if it were

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[18] Many illustrations could be given of instances where a statement of the defendant is used against him and is then shown to be false in part or as a whole, though it serves nevertheless to point to the defendant's guilt. For example, in *Bram* v. *United States*, 168 U. S. 532, it was shown that an accused, told that a witness had seen him committing murder, said, "He could not have seen me. Where was he?" This response was testified to on the theory that it contained an implicit acknowledgment of guilt, an acknowledgment that the accused had performed the crime but had not been seen. Obviously, the prosecution in such a situation would have no reason to prove the truth of the statement that the accused could not have been seen; there would probably be, on the contrary, an effort to show that the accused could have been seen and had been seen. It would make no sense to hold that such a statement required "corroboration" by independent evidence that the accused could not have been seen.

needed, there is sufficient independent evidence to corroborate the admission of this subordinate fact.

Apart from petitioner's admission, the evidence of huge increases in visible wealth during the prosecution years is itself at least some proof that petitioner and his wife had no hoard of cash prior to these years sufficient to account for the increases. The reason and common sense juries are called upon to exercise attest to the improbability of the supposition that such increases represented merely the disgorging of a fortune, derived from unknown and unexplained sources, and formerly held in the perilous form of currency. The evidence here went much further, however. As we have shown, the proof of a new business, conducted without records, commencing and continuing coincidentally with the visible net worth increases, sharply heightened the likelihood that current income, not a prior accumulation of cash, explained the new wealth. Cf. *Bell* v. *United States*, 185 F. 2d 302, 308 (C. A. 4), certiorari denied, 340 U. S. 930; *Gleckman* v. *United States*, 80 F. 2d 394, 399 (C. A. 8), certiorari denied, 297 U. S. 709. It was shown, moreover, that before 1946 petitioner had been a salaried employee, that his wife had worked as a hairdresser before 1943, and that the wife had no occupation except her responsibilities as housewife

after 1943.[19] As the court below observed (R. 263), this evidence further "corroborated appellant's statements as to the source of his increased net worth." It showed that there was no apparent source for large, undeposited accumulations of cash before 1946. Together with the proof that, between 1936 and 1944, petitioner had in only one year (1941) reported income sufficient to require payment of a tax, this evidence made out a wholly convincing case confirming the admission that his large net worth increases beginning in 1946 represented the unrecorded, unreported earnings of the racing news business begun at the end of 1945.

It is immaterial, of course, that the net worth increases admitted by petitioner to represent unreported income were, though substantial, considerably smaller than those shown by the independent evidence.[20] The Government was not re-

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[19] As noted above (note 9, p. 14, *supra*), the wife had a trivial amount of income from a drugstore partnership which obviously had no material effect on the overall net worth picture.

[20] Petitioner, giving only a partial and misleading account of this immaterial difference (Br. 24), uses it in an attempt to support his argument that the independent proof did not corroborate, but refuted, his admissions. He shows that his net worth statement included for 1946 a large item acquired in 1943; correction of this error, he says, eliminates most of the net worth increase admitted for 1946. The critical fact he omits, however, is that the independent evidence showed, not only at the end of 1946, but at the end of 1945 and every other year, large amounts of assets omitted from petitioner's

quired to prove the precise amount of unreported income. *United States* v. *Johnson*, 319 U. S. 503, 517. It was enough that the independent evidence, like petitioner's admissions, proved large increases in net worth and proved that these increases were from current income rather than a prior accumulation. The jury was entitled to consider both the admissions and the other evidence and to draw the inference solidly supported by the whole—that petitioner had wilfully attempted to evade taxes by false reports of his income.

II. PETITIONER'S SIGNED FINANCIAL STATEMENT WAS PROPERLY ADMITTED AND CONSIDERED BY THE JURY

Petitioner moved before trial for suppression of the signed net worth statement which was later admitted against him (R. 2, 15). The motion was heard on January 30, 1953, by Chief Judge Sweeney, who thereafter presided at the trial (R. 3). At the hearing, petitioner adduced the testimony of his accountant representative, Delaney, and three revenue agents who had dealt with Delaney, in support of his contention—renewed at the trial, in the court below, and here—that the statement had been obtained from him on a promise of immunity from criminal

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statement. As thus corrected, the computations established net worth increases for every year, including 1946, much larger than those petitioner admitted.

prosecution. Neither petitioner nor his wife, who was then a defendant, testified, or sought to testify, at this hearing.[21] The motion was denied on February 16, 1953 (R. 3).

At the trial, again contending that his signed statement was inadmissible, petitioner complained that the evidence on this issue should be heard preliminarily by Judge Sweeney outside the hearing of the jury (R. 124–125). His counsel asserted that he "was bringing in Mr. Delaney to testify on the precise point," and urged that the Judge should withdraw the statement from evidence "until such time as he has heard Mr. Delaney and has made an independent * * * decision on the question of the admissibility" (R. 125). The preliminary hearing was not granted. Delaney testified for the defense, after the statement had been admitted for the prosecution, in an effort to show that it had been improperly obtained by a promise of immunity from prosecution (R. 185–205). In admitting the statement, Judge Sweeney cautioned the jury that such evidence "obtained * * * as a result

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[21] The testimony at the hearing on the motion was not made a part of the record before the court below or this Court. It is part of the original transcript, however, to which petitioner occasionally refers (e. g., Pet. Br. 8, n. 2, 23, n. 7). We are certain, in any event, that the facts we have related concerning the motion (which, together with the facts of the hearing and ruling thereon, are reported by the printed record before this Court, pp. 2, 3, 14, 15, 133–4, 194, 202) are outside the area of possible dispute.

of promise of immunity or gain * * * is not admissible as evidence." He said he could not rule as a matter of law that such grounds of exclusion existed, but that the jury would be expected to determine this issue independently (R. 123–4). Again in his charge, he instructed the jury to consider the claim that Delaney "was promised that the case would be closed if he would get the statement." He told them that if they believed the claim—if they found that "trickery, fraud or deceit" had been practiced upon Delaney to obtain the statement—they were to "reject all of the evidence that is contained in that statement and all evidence that was obtained through it" (R. 210).

Petitioner contends here that the admission of his statement was erroneous on two grounds. First, he repeats his factual claim that the statement was improperly obtained from him through a promise that he would not be prosecuted. Petitioner errs in his persistent assertion that this question was wholly ignored by the Court of Appeals (Pet. Br. 15–16, 19, 25, 27–28); the fact is that it was duly considered and correctly resolved on conflicting testimony by the jury and both courts below. Petitioner's second argument—that he was erroneously denied a preliminary hearing by the trial judge alone on the admissibility of the statement—approaches the frivolous. Petitioner had a preliminary hearing

on his motion to suppress; and even had this not been so, since all his evidence on the point was ultimately heard by both judge and jury, there was no trace of prejudice in the procedure followed.

1. On the first of petitioner's arguments—that there was a promise of immunity—it should be said at the outset that petitioner is seriously mistaken in his repeated suggestion (Br. 15–16, 19, 25, 27–28) that this point was overlooked by the Court of Appeals. In support of his statement that the Court of Appeals "apparently applies good law to facts which do not exist" (Br. 28), petitioner quotes from that Court's opinion as follows (Br. 27–28, quoting from R. 260):

> The appellant contends that the district court erred in admitting this statement and in failing to submit to the jury the question of the voluntariness of the statement. We find no merit in these contentions. There is no evidence that the appellant was in any way coerced or compelled to submit the statement. The statement, therefore, was properly admitted in evidence. *Wilson* v. *United States*, 162 U. S. 613 (1896). And since there was a complete absence of evidence of coercion or compulsion, no factual question on this issue was presented for the jury to determine. *Williams* v. *United States*, 189 F. 2d 693 (1951).

But immediately following the point at which petitioner's quotation ends, in the same paragraph, the opinion continues:

> There was, however, some conflict in the evidence as to whether or not the agent secured the statement by means of fraud or deceit. The district court, however, instructed the jury that if trickery, fraud or deceit were practiced upon the appellant by the Government to obtain the net worth statement, they were to reject all the evidence contained in such statement and all evidence that was obtained through it. *Denny* v. *United States*, 151 F. 2d 828 (4 Cir. 1945), cert. denied, 327 U. S. 777 (1946); *Montgomery* v. *United States*, 203 F. 2d 887 (5 Cir. 1953).

As in the trial court's instructions (R. 123, 210), the reference to "fraud or deceit" is plainly directed to the single assertion that there had been a promise of immunity. It is clear beyond doubt that the Court of Appeals, as well as the trial court and jury, considered and rejected this argument.

What is more important, of course, is that the decision on this factual issue is firmly supported by the record. The Revenue Agent, McMahon, to whom the statement was given by petitioner's accountant, Delaney, testified that he had never promised or otherwise indicated to Delaney that petitioner's submission of a net worth statement and a check would result in a closing of the case

(R. 87–88). Delaney, who had himself been employed until 1949 as an Internal Revenue Special Agent investigating fraud cases (R. 185–6, 192), said McMahon had told him "he would close the case in the usual way" upon receipt of the signed net worth statement and check (R. 188, 197). McMahon flatly denied that he had ever "told Mr. Delaney on any date anything like that" (R. 88).

The credibility of the witnesses and the reasonable inferences to be drawn from their conflicting testimony were for the triers of fact—the jury and the judge, who denied the pretrial motion to suppress petitioner's statement and refused to rule the statement inadmissible at the trial. The record, we submit, fully sustains the result they reached. They could readily have believed the testimony of the Revenue Agent and concluded that Delaney was mistaken or untruthful when he suggested that there had been a promise of immunity. (Delaney's testimony is fairly characterized, we think, as a mere "suggestion." He said twice, using the same locution, that McMahon had promised to "close the case *in the usual way*" (R. 188, 197, emphasis added). Especially since "the usual way" would hardly include terminating the case merely on the taxpayer's unchecked submission—a fact Delaney as a former Special Agent should and may well have known (see note 22, *infra*, p. 41)—his statement

could well have been taken as indicating something significantly short of the promise McMahon flatly denied ever having conveyed in any way). Indeed, there is a large element of surface incredibility in the suggestion that a taxpayer's mere acknowledgment of some tax liability would be accepted, without further investigation, as concluding a fraud investigation and potential criminal prosecution. This suggestion, or the claim that such a result had been promised, could have been found particularly unconvincing in the circumstances of this case, where the Government's investigation later revealed net worth increases and unreported income far exceeding the amounts admitted by petitioner.[22]

In short, petitioner's claim that his admission had been procured by a promise of immunity was fairly considered and properly rejected by the

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[22] For many years before and during Delaney's service as a special agent, it had been Treasury policy not to close investigations without criminal prosecution where there was evidence of intent to defraud. At least where an investigation had been begun prior to a taxpayer's disclosures, prospective criminal prosecutions were not abandoned unless investigation disclosed no reasonable grounds for anticipating conviction. This settled policy withheld from investigating agents authority to close an investigation already begun but not completed (as was the case here) simply on the basis of the taxpayer's offer to pay what he acknowledged to be a tax liability in default. See *Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives*, 82d Cong., 2d Sess., *on Administration of the Internal Revenue Laws* (January 22, 23, 24 and 25, 1952), pp. 140–142.

jury and both courts below. His argument that a contrary factual conclusion should have been reached presents no basis for reversal here.

2. There is even less substance in the contention that the trial judge should have held a hearing during the course of the trial, excluding the jury, to permit presentation to the judge alone of the evidence purporting to show that petitioner's admission had resulted from a promise of immunity. The short answer to this argument is that petitioner had precisely the preliminary hearing he says was omitted, on his motion to suppress the written statement in question. The hearing was conducted long before the jury was even impanelled, by the judge who later presided at the trial, and the motion was duly denied. There is not the slightest basis for the argument that the procedure should have been repeated. Cf. Rule 41 (e), F. R. Crim. P.; *Nardone* v. *United States,* 308 U. S. 338, 341–342.

The record thus refutes the suggestion (Pet. Br. 29), for which petitioner invokes *United States* v. *Carignan,* 342 U. S. 36, that the denial of a preliminary hearing during the course of the trial deprived *petitioner himself* of an opportunity to testify in the jury's absence to the circumstances in which he supplied the written net worth statement. Petitioner had such an opportunity and demonstrated that it was of no use

to him; he did not testify at the pretrial hearing on his motion to suppress.[23]

Moreover, the record makes clear that petitioner had not changed his mind at the trial; the superfluous preliminary hearing he sought was not requested in order that he might himself testify outside the jury's hearing. In language too plain for doubt, petitioner's counsel asked that the judge preliminarily hear Mr. Delaney and only Mr. Delaney, before permitting the written statement to remain in evidence (R. 125). There was not the faintest suggestion that petitioner himself wished to give testimony. There was, accordingly, no problem like that in the *Carignan* case of a defendant entitled to remain silent before the jury but desiring to be heard by the judge alone on the facts surrounding admissibility of a confession or admission. And this is obvious, we emphasize, from the trial record alone, apart from the independently decisive fact that petitioner could have given such testimony, if he had had any to give, at the pretrial hearing.[24]

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[23] In the light of the testimony for both the prosecution and the defense, it is apparent that petitioner was in no position to give testimony that would have helped him on this issue. Nothing said by either Delaney or Agent McMahon suggested that the latter, with whom petitioner conferred only once before the net worth statement was submitted, had made petitioner any promise of any kind or even discussed with him the preparation of such a statement.

[24] Recognizing that he gave no hint of a desire to testify, petitioner says here (Br. 29) that "it does not appear whether

We recall, finally, that the testimony of the accountant, Delaney, which petitioner asked the judge to hear preliminarily, was ultimately heard by both judge and jury (R. 185–205). There is no question, then, that petitioner had full opportunity, at the trial as well as before, to develop his version of the facts leading to his written net worth statement. And there is, of course, nothing in the *Carignan* decision making it necessary or desirable that such testimony, from anyone other than the defendant, should be heard preliminarily, with the jury excluded. So the record of the trial alone shows persuasively what the fact of the pretrial hearing places beyond dispute—that petitioner's request for a preliminary hearing at the trial was pointless and was properly denied.

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counsel contemplated the testimony of the petitioner himself. Indeed it is quite possible that such a decision had not been made at that time and that the development of the evidence would make the final decision." The record cuts the ground from under such speculation. Petitioner's counsel had seen fully "the development of the evidence" at the pretrial hearing and had made "the final decision" not to offer any testimony by petitioner. His comments at the trial belie the suggestion that another preliminary hearing during the trial might in some way have affected this decision. It certainly could not have affected the fact that petitioner was in no position to have knowledge pertinent and admissible on this issue. See note 23, *supra*, p. 43.

III. THE COURT OF APPEALS WAS NEITHER ASKED NOR REQUIRED TO DETERMINE WHETHER THE EVIDENCE INDEPENDENT OF PETITIONER'S ADMISSIONS WAS SUFFICIENT TO SUSTAIN THE CONVICTION

1. In *Stein* v. *New York*, 346 U. S. 156, this Court considered the following question (p. 188): "If the jury rejected the confessions, could it constitutionally base a conviction on other sufficient evidence?" The question was raised "by a request for instruction to the jury that if it found the confessions to have been coerced it must return a verdict of acquittal." *Ibid.* This Court had already held that neither the trial judge's admission of the confessions there involved nor a jury determination that they were voluntary (and, therefore, properly to be considered) could be held constitutionally erroneous. The Court then held that there had been no error in refusing the requested instruction, concluding that a state jury could be assumed hypothetically to have rejected a confession (and, therefore, presumably to have obeyed instructions and given it no weight) and nevertheless be constitutionally permitted to convict on other sufficient evidence.

Here, no comparable instruction was requested. Nor did petitioner call upon the Court of Appeals to consider whether the evidence apart from his admissions would support the verdict. He argues, nevertheless (Br. 30–33), invoking *Stein* v. *New York*, that the jury may have rejected his admissions as improperly obtained and may have

then convicted him on the other evidence. He urges that, although it was not asked to consider the sufficiency of this other evidence alone to sustain the verdict, the Court of Appeals erred in failing to do so. If it were necessary to consider the problem, we think the independent evidence upon which petitioner says the jury may have convicted would support the verdict. See pp. 28–31, 33–34, *supra*. But there is no ground for such a partial appraisal of the record.

The shortest answer to petitioner's novel argument is that no basis was laid for it in the trial court, it was not attempted in the Court of Appeals, and it ought not to be heard for the first time here. Apart from this infirmity, however, there is no merit in the proposal that jury verdicts be tested piecemeal on the unwarranted assumption that they rest upon only part of the evidence.

The decisive objection to this proposal is found in the settled principle that the jury's verdict must be sustained on appeal if there is substantial evidence, "taking the view most favorable to the Government," to support it. *Glasser* v. *United States*, 315 U. S. 60, 80; see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–2; *Stilson* v. *United States*, 250 U. S. 583, 588–9. This rule leaves no room for the suggestion that an appellate court should take part of the evidence (here,

the admissions), assume *arguendo* that the jury rejected it, and then reverse the conviction if the rest of the evidence is insufficient to sustain it. For, "taking the view most favorable to the Government," the assumption must be that the jury did not reject the admissions, and the only question on appeal (the separate question discussed in Point II, *supra*) is whether the admissions were properly submitted to the jury's consideration.

When this question of admissibility, which is for the trial judge, is answered in the affirmative on appeal (as we have argued in Point II it must be in this case), there can be no justification for demanding that the appellate court go further, proceed as if the jury ruled the admissions out of consideration, and decide the sufficiency of the other evidence alone. Such a procedure would entail taking the view *least* favorable to the Government. At least in a case like the one here, where no instruction was sought that the jury should acquit if it rejected the admissions, it would lead to this startling result: The appellate court would assume that the admissions had been rejected; it would reverse if it found the other evidence inadequate to support the conviction; and it would do all this even though the jury might have (and probably had) accepted the admissions and relied upon them in reaching its verdict. As we have stressed, this last possibility, that the jury did not reject the confessions, is

the proper one to be assumed on appeal. It follows that the speculative appellate excursion petitioner demands cannot be sanctioned.

An opposite conclusion would logically entail far-reaching and wholly impossible consequences for criminal appeals. There is no reason why the same argument could not be advanced with respect to any potentially significant item of evidence, other than a confession or admission, adduced at the trial. Did the jury credit this evidence? If it did not, was the rest of the evidence sufficient to sustain the verdict? If the answer is no, on petitioner's thesis, the conviction must be reversed.

The foregoing extension of petitioner's argument involves no neglect of the admittedly special character of evidence of confessions or admissions. The extension is, we submit, necessarily and fully implicit in the argument where, as in this case, no instruction like that in *Stein* v. *New York* was requested. For there was in this case no offer of a test by which to judge objectively whether the jury accepted or rejected the admissions. So speculation on this question is no more or less justified than would be similar speculation regarding any other item of evidence at the trial. Our suggested analogy using evidence other than a confession or admission merely points up the fatal defect in petitioner's argument—that it urges an assumption on appeal contrary to the

one by which the sufficiency of the evidence is properly to be tested.

2. What we have said disposes, we think, of the argument in this case, where there was no requested instruction like the one in *Stein* v. *New York*. However, since what this Court writes is likely to reach beyond this case, we add our view that the answer to petitioner's argument ought not to rest simply on the sufficient, but unduly narrow and potentially troublesome, ground that there was no request for an instruction that the jury should acquit if it found the admissions to have been improperly obtained. We believe that had such an instruction been requested, it would properly have been denied. And we would argue none the less that there would have been no need for the appellate court, had it been asked, to determine the sufficiency of the other evidence alone to sustain the conviction. These conclusions, it is submitted, strike the most acceptable balance between the objectives of (1) protecting defendants (and others) against improperly extorted or induced confessions and admissions and (2) preventing the escape from justice of persons whose guilt is susceptible of proof by competent evidence.

The question at hand arises because in this, as in many other cases, the trial judge, after ruling the disputed admissions admissible, instructed the jury to disregard them and all evidence obtained

through them if, unlike him, they found the admissions to have been improperly obtained. Though he strenuously urged such instructions himself (R. 16–18), petitioner seems to suggest (Br. 33) that, because they permit the kind of argument he attempts, they ought perhaps to be condemned—presumably, that is, that the trial judge should alone rule on admissibility and not permit reconsideration by the jury of the factors bearing on this ruling. It is obvious, however, that in federal as well as state courts, instructions like these reflect "a traditional practice assumed on the whole to be of advantage to the defense and an additional protection to the accused." *Stein* v. *New York, supra,* at 189. See *Wilson* v. *United States,* 162 U. S. 613, 624; 3 Wigmore, *Evidence* (3d ed.), p. 347, n. 3. The problem as we see it is to preserve this advantage and protection for the accused without requiring that a confession or admission, deemed admissible by a trial and appellate court, should lead to an acquittal and prevent a retrial where a jury supposedly makes a contrary "ruling," concealed in its general verdict, on "admissibility."

The answer, compelled by practical necessities, lies in adherence to the rule that admissibility of evidence is a question for the court, not the jury. See *McNabb* v. *United States,* 318 U. S. 332, 338–9, n. 5; 1 Wigmore, *Evidence* (3d ed.), § 12; 2 *id.* § 487; 9 *id.* § 2550. And it is only this question of "law," frequently of constitutional law

giving this Court jurisdiction to review state criminal convictions, which is proper for consideration on appeal. This Court said as much in *Wilson* v. *United States, supra,* at 624.[25] Adherence to this division of responsibilities between judge and jury, while it doubtless results in calling the same mental process by two different names, has eminently sensible consequences more vital to the administration of justice than logical symmetry.

The practical judgment leading to the conclusion we have stated in technical shorthand is more clearly and persuasively expressed in terms of the possible alternatives. Where the traditional instruction indicated in this Court's *Wilson* opinion is given, an appellate court, reviewing the circumstances surrounding a confession or admission, will ordinarily order a retrial if it finds the confession or admission to have been improperly received. "This Court never has decided that reception of a confession into evidence, even if we held it to be coerced, requires an acquittal or discharge of a defendant. On the contrary, this Court has returned all such cases for retrial, which we should not have done if obtaining and

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[25] "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. * * * The question here, however, is simply upon the admissibility of the statement * * *."

attempted use of a coerced confession were enough to require acquittal." *Stein* v. *New York*, *supra*, at 189. In such a case, the jury may or may not have agreed with the trial judge that the confession was voluntary and otherwise proper. The likelihood is that the jury did agree. Indeed, this is commonly assumed on appeal in deciding the issue of coercion or improper inducement. *Id.* at 181–2.

Suppose, however, that the jury had not agreed. And suppose it had been instructed to acquit if it rejected the confession or admission. It would presumably acquit and set the defendant free, contrary to the rule that only a retrial is warranted for error in the admission of an improperly obtained confession. And this peculiar ruling of law would be the undiscoverable basis for a general verdict of acquittal.

If such a procedure is to be sanctioned, it should be a uniform one, to be enforced by judges, who ordinarily pronounce the law, as well as juries. We submit, however, that defendants are sufficiently protected by the rule now in force. It will be a rare case, of course, where a jury rejects a really damaging confession and goes on to convict the defendant anyhow. But even in such a case, the public interest in preventing coerced confessions and the particular defendant's interest in a fair trial are adequately served where both trial and appellate judges are

persuaded that (1) the confession was properly admitted and (2) the evidence as a whole, including the confession, justifies the conviction.[28]

This conclusion turns out, after all, to be merely one illustration of the general rule prevailing where factual issues affecting admissibility, resolved by the court, may be reconsidered by the jury in assessing the weight of the evidence. It would hopelessly complicate trials and appeals if the jury's share of this task were treated as if it were the same as the judge's—with the added fillip that a jury finding of "inadmissibility" would lead to acquittal rather than the established result of ordering a retrial. At least while the system of general verdicts in criminal trials prevails, the kind of instruction proposed and properly refused in *Stein* v. *New York* would place an unprecedented and unjustifiable obstacle in the way of fair determinations of defendants' guilt or innocence.

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[28] In an important sense, our argument here does not reach the general proposition which was a main concern in *Stein* v. *New York*—i. e., that a conviction may be sustained on other sufficient evidence where an invalid confession was received into evidence. We are dealing primarily with the question of who decides whether the confession was erroneously received. On our argument, leaving the question of admissibility as such to trial and appellate judges, it is consistent to hold for the federal courts that an improperly admitted confession always requires reversal of the conviction. Cf. *Wilson* v. *United States*, *supra*; *McNabb* v. *United States*, 318 U. S. 332.

IV. THERE WAS NO INCONSISTENCY BETWEEN THE THEORY ON WHICH PETITIONER WAS CONVICTED AND THE GROUNDS OF THE AFFIRMANCE BY THE COURT OF APPEALS

Petitioner argues, finally (Br. 33–40), that he was convicted on a theory different from that on which the Court of Appeals affirmed. He rests this contention on the fact that, while the Government deemed it unnecessary at the trial to allocate assets as between him and his wife, the Court of Appeals concluded that the net worth increases and unreported income had actually been his. The shortest answer to the argument is that, on its face, it shows only that the Court of Appeals found ample proof of a factual element above and beyond what was necessary to conviction on the prosecution's trial theory; such a supposed "inconsistency" could not possibly have harmed petitioner. Before concluding with this point, however, we show that the trial judge, who directed acquittal of petitioner's wife, gave instructions under which the jury, like the Court of Appeals, probably found in fact (though unnecessarily, in our view) that the net worth increases during the indictment years were in reality petitioner's, not his wife's, because it was his unreported income which accounted for the increases and for the unpaid taxes he wilfully attempted to evade.

1. As petitioner urges (Br. 4, 5, 20, 33–35), and as the court below agreed (R. 258–259), the

Government's proof at the trial was designed to show increases in the joint net worth of petitioner and his wife without regard to which of the two had technical title to given assets acquired during the prosecution years. The Government also undertook to show that petitioner's wife had no significant source of income during this period, that substantially all the current income of both came from petitioner's racing news business, and that the unrecorded and unreported income of this business accounted for the joint net worth increases of petitioner and his wife. Instructing the jury to determine whether petitioner had a source of the allegedly unreported income, the trial judge also told them that, in appraising the net worth computations, they should "include all the property [they found petitioner] owned, that he owned as distinguished from possibly having in his name" (R. 211–212). This instruction, it should be remembered, came after the trial judge, having complained that the Government had proved no traceable income for petitioner's wife (R. 149) and stating that no starting point had been established as to her (R. 184), had directed her acquittal."

" The propriety of this acquittal, at least questionable on the broad theory of the prosecution (p. 56, *infra*), is not in issue here, of course. We mention it only for the possible light it throws on the scope of the prosecution's theory as it was ultimately limited by developments at the trial.

It thus appears that the trial court's instructions narrowed and made more difficult the theory of the prosecution. That theory, as the Government offered it, was this: Petitioner and his wife filed joint tax returns. Each was individually liable for the whole of the tax they jointly owed. Internal Revenue Code of 1939, Section 51 (b) *supra,* pp. 2–3. If either or both knew that the return they jointly filed was false—knew that it failed to report the total income of both and sought thereby to understate their joint and several tax liability—then either or both would be guilty of a wilful attempt "to evade or defeat any tax" as defined in Section 145 (b), *supra,* p. 3. On this theory it made no difference which of the two had earned the concealed income or which became "owner" of the assets acquired with the income.[28]

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[28] As he mentions here (Br. 13), petitioner attacked the theory as lumping him and his wife into an "entity" whereas criminal guilt is, of course, individual. The ready answer to this argument is that while the elements of the offense in Section 145 (b) had to be established against each defendant individually, it is not necessary to such a showing that the tax for which the particular defendant is liable and which he attempts to evade be shown to have arisen from his own income. Indeed, it is clear that Section 145 (b) may be violated by one who not only did not earn the income subject to tax, but is not even liable (as both petitioner and his wife were) for payment of the tax. *United States* v. *Johnson,* 319 U. S. 503, 514–515.

In the instructions to which we have referred, however, (*supra*, p. 55), the trial judge made the task of the prosecution more difficult. The jury was told that to convict petitioner they must not only find that he had a source of unreported income, but that the increases proved were in substance (if not in form) increases in *his* net worth. And the Court of Appeals, while clearly recognizing that the Government had not allocated "the actual ownership of the various assets between the [petitioner] and his wife" (R. 259), concluded that the jury could have inferred that the increases shown were increases in petitioner's net worth derived from his unreported income (R. 260, 261, 263).

There can be no question that this conclusion was fully supported by the evidence, which showed that petitioner had unrecorded and unreported income while his wife had practically none, and showed petitioner's extensive use of assets ostensibly owned by his wife. The point here is that the appellate court's emphasis upon this conclusion in its opinion involved no shift in "theory," but was in fact wholly consonant with the instructions under which the jury convicted.

It is true, as petitioner insists (Br. 33–36), that the Court of Appeals' opinion highlights petitioner's own net worth statement and the other evidence showing that the unreported income and net worth increases were in reality his. But this

selection of less than all the evidence to show the firm foundation for the conviction involves no change in "theory." Petitioner's admissions, solidly corroborated (*supra,* pp. 28–31, 33–34), comprised, after all, a convincing, if incomplete, basis for upholding the jury's verdict. And there seems little need to tarry over the suggestion (Pet. Br. 35) that the petitioner's signed net worth statement—which was the subject of so much testimony at the trial (e. g., R. 66, 77–78, 89–94, 127. 155–156, 187–191, 200–202), and which figured prominently in the instructions to the jury (R. 210)—was simply ignored by the jury. It is perfectly clear that this statement, if it was less important in the whole picture before the jury than it appears to be in the opinion below, was a significant item of evidence which the jury could hardly have overlooked.

In short, the Court of Appeals affirmed petitioner's conviction on a view of the evidence substantially no different from that the jury must have had in the light of the instructions by which it was guided. Petitioner's argument amounts in the final analysis only to speculation about whether the various items of evidence were identically weighed by both the jury and the appellate court. The speculation is fruitless. Assuming petitioner is right in supposing that his admissions were less important to the jury than they were to the Court of Appeals, this difference in

emphasis is no basis for arguing that there was any such shift in legal theory as could cast doubt on the propriety of the affirmance of his conviction.

2. Petitioner's argument is no better if we ignore entirely the trial court's instructions and consider only the asserted "inconsistency" between the Government's theory at the outset of the trial and the opinion of the Court of Appeals. As we have noted, it was unnecessary on the Government's theory to show whether the unreported income and technical ownership of assets were attributable to petitioner or his wife. It was enough that petitioner and his wife jointly had unreported income, that petitioner knew it, and that he, jointly with her, wilfully filed a false return in an attempt to evade the taxes for which he as well as she was liable in full. All that the Court of Appeals did was to find that an added fact, unnecessary to the Government's theory, could have been inferred by the jury—i. e., that the income and assets were petitioner's.

It is plain that this conclusion was in no way inconsistent with the thesis the Government had urged. It would be enough, we note, that the prosecution's theory was valid and that the evidence supported it if that was all that was submitted to the jury. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618. The even simpler

point here is that the "theory" of the Court of Appeals departs from the prosecution's trial theory only in going beyond it. If the evidence supports the conclusion of the appellate court, as we think it clearly does, it is *a fortiori* sufficient to support the Government's theory at the trial.[29] What petitioner complains of as inconsistency, if it existed at all, was favorable to him.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals, affirming petitioner's conviction, should be affirmed.

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[29] Thus, there is no problem here like the one which in *Nye & Nissen* formed the basis of the dissenting opinion of Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Rutledge. 336 U. S. at 620–627.

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